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Supreme Court, U.S.
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No. A-275

In The

Supreme Court of the United States

October Term, 1993

JEFFERSON KENNETH OBERLE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Jefferson Kenneth Oberle
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QUESTIONS PRESENTED

1. Whether, under the Fifth Amendment, a person proceeding under 28 U.S.C. § 2255 is deprived of due process of law by the premature dismissal of his action for sufficiency of the complaint.

2. Whether, under the Fifth and Sixth Amendments, a person proceeding under 28 U.S.C. § 2255 is denied due process of law the right to confrontation when the action is prematurely dismissed on the sole basis of a credibility judgment of the court.

3. Whether, under the Fifth and Sixth Amendments, a person proceeding under 28 U.S.C. § 2255 is denied due process of law and the right to confrontation when the action is prematurely dismissed for sufficiency of the complaint, and that finding is based on a credibility judgment of the court, where the only evidence presented is that of the petitioner, and such evidence remains uncontroverted.

4. Whether, under the Fifth Amendment, a person proceeding pro se under 28 U.S.C. § 2255 is deprived of due process of law when his action is prematurely dismissed without giving him the protection normally afforded pro se litigants by the courts.

5. Whether, under the Fifth Amendment, a person proceeding under 28 U.S.C. § 2255 is deprived of due process of law when the court prematurely dismisses the action before making a finding of the record.

6. Whether the district court was correct in dismissing the action in its nascent state within the meaning of *Sheuer v. Rhodes,* 416 U.S. 232, 40 L.Ed.2d 90, 94 S.Ct. 1683 (1974) and *Conley v. Gibson,* 355 U.S. 41, 45–46, 2 L.Ed.2d 80, 78 S.Ct. 99 (1957).

7. Whether it is a violation of 28 U.S.C. § 753, the Court Reporter Act, and Rule 11 of F.R.Civ.P. and the *McCarthy* Rule, as set out in *McCarthy v. United States,* 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969), to find that it was not a fatal error to fail to have a court reporter in attendance at the hearings and to have no record of the hearings.

8. Whether the question of the existence of the transcript was properly before the district court when the United States made the absence of the transcript known and asked the district court to decide the case sans a transcript.

9. Whether the district court was commanded by the Court Reporter Act and Rule 11 of F.R.Civ.P. and the *McCarthy* Rule to investigate why there was no trace of a transcript and why the controlling laws and dicta and the rules of the court were not complied with in that no record was made nor was a court reporter present at the hearing.

10. Whether the court of appeals was commanded by the Court Reporter Act, Rule 11, and the *McCarthy* Rule to find that it was directed to vacate the plea and the disposition of the district court and to remand the action to

the district court for further actions consistent with the above laws, rules, and dicta on the basis of the total absence of a record or transcript, the appellant's uncontroverted affidavit that no record or transcript was ever made, and his assertion that, according to his own investigation and that of the Clerk of Court, the United States Attorney, and the Court Reporter, there was never a court reporter present at the hearing; and whether the court was so commanded regardless of when (at what stage of the proceedings) the court's previous total failure to do so was discovered.

FOREWORD

We are Jefferson Kenneth Oberle, petitioner, and Michael Henry Smith, lay assistant, and we are proceeding *pro se* in this Court. We would take this time to point out that we are not learned litigators. We are sure that we have made inadvertent errors, but we have not intentionally falsified information and are in no way attempting to mislead anyone. Nor have we intended any slights or discourtesy to anyone. We are doing our best to be as professional and as ethical as possible. We have obeyed the rules of form and procedure to the best of our ability.

We are aware that it has been some good long time since a *pro se* litigant successfully proceeded in this Court or was called into it to argue his or her case. We hope to be an exception.

We hope and pray that this Court will grant to us the leeway normally afforded to *pro se* litigants in the perfection of their actions.

With the greatest respect to all, we will proceed with our argument.

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CONLEY V. GIBSON, 355 U.S. 41, 45–46, 2 L.ED.2D 80, 78 S.CT. 99 (1957), AND *MCCARTHY V. UNITED STATES*, 394 U.S. 459, 89 S.CT. 1166, 22 L.ED.2D 418 (1969); THAT A FULL AND COMPLETE RECORD BE MADE OF EVERY ACTION THAT CONCERNS THE PERSONAL LIBERTY OF A CITIZEN SO THAT, THE MORE METICULOUSLY THE RULES ARE ADHERED TO, THE MORE THEY TEND TO DISCOURAGE, OR AT LEAST PERMIT THE EXPEDITIOUS DISPOSITION OF, THE NUMEROUS AND OFTEN FRIVOLOUS POST-CONVICTION ATTACKS ON THE CONSTITUTIONAL VALIDITY OF GUILTY PLEAS AND THE TIME-CONSUMING AND DEBILITATING EFFECT THAT THE APPELLATE REVIEW OF AN ILL-DECIDED OR INCOMPLETELY DEVELOPED COURT RECORD HAS ON THE APPELLATE COURTS' VERY WEARYING SCHEDULES AND THE EXTREME COSTS THAT THE PUBLIC IS CAUSED TO BEAR FROM THE CONSTANT HEARING, REMAND, AND APPEAL TO FINALLY GET A RECORD THAT THE "APPELLATE COURT CAN INTELLIGENTLY REVIEW," *UNITED STATES V. BIRD*, 621 F.2D 989 (9TH CIR. 1980). IT IS THIS COURT'S RESPONSIBILITY TO ENFORCE ITS SUPERVISORY POWERS OVER THE LOWER COURTS EVEN AT TIMES WHEN IT IS IN NO OTHER WAY COMMANDED TO, *CUPP V. NAUGHTON*, 414 U.S. 141, 38 L.ED.2D 368, 94 S.CT. 396 (1973). 22

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PETITION FOR WRIT OF CERTIORARI

To the Honorable William H. Rehnquist, Chief Justice of the United States, and to the Honorable Associate Justices of the United States Supreme Court:

Jefferson Kenneth Oberle, petitioner, seeks a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit from the memorandum filed April 23, 1993, rehearing and suggestion for rehearing en banc denied July 9, 1993.

BEST AVAILABLE COPY

On August 22, 1993, U.S. Circuit Judge R. Lanier Anderson denied the motion to stay the mandate to allow the petitioner to seek Certiorari to this Honorable Court, despite the profound public interest that it commands.

OPINION BELOW

The United States Court of Appeals for the Eleventh Circuit filed its unpublished memorandum on April 23, 1993. This appears as Appendix B to this petition.

On July 9, 1993, the U.S. Eleventh Circuit denied a petition for rehearing and rejected the suggestion for rehearing en banc. A copy of that order appears as Appendix C to this petition.

On August 27, 1993, Judge R. Lanier Anderson of the U.S. Eleventh Circuit denied a motion to stay the mandate in this case, which was sought specifically to allow the petitioner to seek Certiorari to this Honorable Court. A copy of that order appears as Appendix D to this petition.

JURISDICTIONAL GROUNDS

(i) The United States Court of Appeals for the Eleventh Circuit affirmed the decision of the U.S. District Court for the Southern District of Alabama, Southern Division, denying the Writ of Habeas Corpus, under 28 U.S.C. § 2255, by an unpublished memorandum filed April 23, 1993. A copy of that memorandum appears at Appendix B-1.

(ii) The U.S. Eleventh Circuit denied a petition for Rehearing/Suggestion for Rehearing En Banc on July 9, 1993. A copy of that order appears at Appendix C-1.

(iii) On August 27 1993, Judge R. Lanier Anderson of the U.S. Eleventh Circuit denied a motion to stay the mandate which was sought specifically to allow the petitioner to seek Certiorari to this Honorable Court. A copy of that order appears at Appendix D-1.

(iv) Jurisdiction to review by Certiorari a decision of the United States Circuit Court in a criminal case being challenged under the Writ of Habeas Corpus is provided under 28 U.S.C. § 1254.

U.S. CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [VI.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

UNITED STATES CODE SECTIONS INVOLVED

18 U.S.C. §§ 842(j), 844(b), and 1202(a); *passim*

27 C.F.R. §§ 55.164 and 55.201–.220; *passim*

28 U.S.C. §2255; *passim*

28 U.S.C. §753; *The Court Reporter Act*

(a) Each district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands shall appoint one or more court reporters.

(b) One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule of the court or by one of the judges, and shall record verbatim by shorthand or by mechanical means which may be augmented by electronic sound recording subject to regulations promulgated by the Judicial Conference: (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceed-

ings as a judge of the court may direct or as may be required by rule or order of court or as may be requested by any party to the proceeding. The Judicial Conference shall prescribe the types of electronic sound recording means which may be used by the reporters.

The reporter shall attach his official certificate to the original shorthand notes or other original records so taken and promptly file them with the clerk, who shall preserve them in the public records of the court for not less than ten years. An electronic sound recording of proceedings of arraignment, plea, and sentence in a criminal case, when properly certified by the court reporter, shall be admissible evidence to establish the record of that part of the proceeding.

The reporter shall transcribe and certify all arraignments, pleas, and proceedings in connection with the imposition of sentence in criminal cases unless they have been recorded as provided in this subsection and the original records so taken have been certified by him and filed with the clerk as hereinabove provided in this subsection. He shall also transcribe and certify such other parts of the record of proceedings as may be required by rule or order of the court. Upon the request of any party to any proceeding which has been so recorded, who has agreed to pay the fee therefor, or of a judge of the court, the reporter shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcripts his official certificate, and deliver the same to the party or judge making the request.

The reporter shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made.

* * * * * *

The original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge.

(c) *The reporters shall be subject to the supervision of the appointing court and the Judicial Conference in the performance of their duties, including dealings with parties requesting transcripts.*

(d) The Judicial Conference shall prescribe records which shall be maintained and reports which shall be filed by the reporters. Such records shall be inspected and audited in the same manner as the records and accounts of clerks of the district courts, and may include records showing:

(1) The quality of transcripts prepared;

* * * * * *

(4) *The amount of time the reporters are in attendance upon the courts for the purpose of recording proceedings;* and

* * * * * *

(Emphasis added; footnote omitted.)

STATEMENT OF THE CASE

Petitioner Oberle was indicted upon and arraigned for various offenses under 18 U.S.C. §§ 842(j), 844 (b), and 1202(a); and 27 C.F.R. §§ 55.164 and 55.201–.220; the most serious and lead charge that of being a felon in possession of a firearm after having been convicted of a felony on September 26, 1986. The effective date of the amendment and revision of the statute making the Code inapplicable to

Oberle was November 1, 1986. Oberle was influenced to plead guilty thirty-five days prior to the effective date of the amendment that would absolutely determine the inapplicability of the statute to him. The statute was never applicable to Oberle, and he faced no danger of conviction.

At the time of the plea change and the Rule 11, F.R.Crim.P., colloquy, there was no court reporter in attendance, and no electronic record was made of the hearing.

In the plea colloquy, when the Honorable Judge Emmett Cox asked the petitioner whether he was pleading under duress, he answered in the affirmative, that he was. Oberle was improperly coerced and influenced by his attorney into pleading guilty.

Oberle had recounted the story of his plea colloquy to many people over the years, and it was well known to those who knew him that he had resisted pleading guilty. Finally, one who was somewhat knowledgeable in the law told him that a plea that was not voluntary was not valid, and if he could prove it to the court, he would be allowed to replead. Oberle researched this and eventually proceeded to the district court with a pleading under 28 U.S.C. § 2255, charging that he had changed his plea under duress and had had ineffective assistance of counsel. This was on September 13, 1991.

After Oberle filed his contest of the conviction, the United States filed for leave to have a transcription made of the hearing and to create the record. The United States was then unable to find the record and requested another extension of time to hunt for it. Both of these extensions of time were unopposed by Oberle. Finally, when the United States could not find the transcript or any trace of any record, it

filed its response to the district court, the pertinent part of which reads as follows:

> The United States has asked for and received two extensions of time within which to file this response in order to have the defendant's guilty plea transcribed. The court reporter has informed the United States that he cannot find the notes of that guilty plea. Because of Mr. Oberle's assertion that he entered his guilty plea "under duress," a review of the transcript of the proceedings that day would be helpful in determining exactly what it is that Mr. Oberle is now claiming which would entitle him to have his conviction set aside. *The United States submits, however, that even without the transcription of the guilty plea hearing, this court can deny the motion without a hearing because it fails to make any allegations which would entitle the defendant to any relief.*

(Emphasis added.) The United States did not report that *no transcription* of the hearing had been prepared, nor was a court reporter present. Nor did the United States ever attempt to stipulate to the record or to give its version of the facts or controvert the version given by the petitioner Oberle. The United States urged the district court to find especially in the absence of the record.

The district court was not immediately persuaded by the United States and gave an order for an amended complaint, calling for Oberle to give his account and evidence. Oberle complied with this order and gave his own affidavit and account of the events of that plea colloquy. He also asked for an evidentiary hearing to recreate the record. The United States

never again replied. Oberle's affidavit remains uncontroverted and the only stipulation to the record ever made.

The district court, the Honorable Judge Richard W. Vollmer, filed an opinion and order dismissing the action based on his disbelief that Oberle could be telling the truth. The district court held:

> ***Duress.***—The court finds defendant's duress claim to be *incredible.* Not only has defendant failed to allege *any* facts in support of his contention that he was acting under legal duress at the time he pled guilty, but he also *disingenuously* maintains that the trial judge did not conduct *any* sort of inquiry after the defendant informed the judge that he was so pleading. *To accept defendant's statements would be to conclude that the trial judge wholly abandoned his duties by dispensing with the entire guilty plea colloquy then required and now required of trial judges. The court is unwilling to accept such a conclusion.*

Id. at 4–5, n. 1. (Emphasis on *any* in the original; remaining emphasis added.) Oberle responded with a Motion to Reconsider and once again asked for a hearing to supplement the record. The district court granted the Motion to Reconsider and, upon reconsideration and review, denied the motion and affirmed its earlier decision.

A timely appeal was taken, and during the preparation of the record for the appeal, it was confirmed to Oberle that there had never been a court reporter present at the hearing. Oberle conducted his own independent investigation to confirm the investigation conducted by the A.U.S.A. Ginny Granade and the Clerk of the Court. He was directed to Edward Howard, the court reporter, who informed him that

he had been at a hearing prior to that hearing and to one after, but that he had not been present at that hearing and had nothing in his records to indicate otherwise. This was included in the record on appeal by his own affidavit.

Oberle asked that the U.S. Eleventh Circuit Court of Appeals reach his questions on the grounds of premature dismissal of the action; that the district court was clearly erroneous in its decision to dismiss on an subjective determination of credibility; and finally on the basis that the Court Reporter Act, 28 U.S.C. § 753, and *McCarthy v. United States*, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969) (the *McCarthy* Rule) both called for vacating the guilty plea.

The U.S. Eleventh Circuit Court of Appeals did not consider the question of the premature dismissal and instead concerned itself with the means of recreating the record, overlooking the fact that Oberle was the only one who had attempted to stipulate the record, and yet he had been denied any of the methods that he requested for further generation of the record, and the United States never attempted to participate in the reconstruction of the record even though it was never in any way prevented from fulfilling its duty so to participate. On the contrary, the United States proffered that the record was not necessary to the resolution of the action.

In reply to Oberle's initial brief, the United States' sole argument was that the issue of the record was not properly before the court. This despite the fact that they were the ones who had initially made the record an issue in the district court.

The memorandum opinion of the U.S. Eleventh Circuit is an unpublished opinion.

A timely motion for rehearing and suggestion for rehearing en banc was made and was denied by the circuit court of appeals.[1]

A motion to stay the mandate was made and denied by the circuit court of appeals.

The petitioner continues to maintain that the action was prematurely dismissed and that he was denied due process of law by the dismissal. Furthermore, when the court's total failure to comply with the Court Reporter Act was discovered, the court of appeals was bound to vacate the plea and remand the case to the district court with appropriate instructions. Thus they have created a rift in their own circuit and with the other circuits and have violated the law of the United States and the rules of the courts and the law of the case and the dicta of this Court.

This Court is therefore compelled to hear and grant this Petition For Writ Of Certiorari in order to perform its supervisory function with regard to the inferior federal courts and to restore the continuity to the circuits and to the U.S. Eleventh Circuit.

REASONS FOR GRANTING CERTIORARI

1. The U.S. Eleventh Circuit Court of Appeals has created an exception to the Due Process Clause of the Fifth Amendment.

2. The U.S. Eleventh Circuit Court of Appeals has created an exception to 28 U.S.C. § 753, the Court Reporter Act, and to Rule 11, Federal Rules of Criminal Procedure.

3. The U.S. Eleventh Circuit Court of Appeals has created an exception to the Confrontation Clause of the Sixth Amendment.

4. The U.S. Eleventh Circuit Court of Appeals has created a new rule which allows that *no federal judge is capable of making a mistake.*

5. In the creation of these exceptions and this new rule, the U.S. Eleventh Circuit Court of Appeals has endorsed and participated in *unsound judicial practices.* It is the duty of this Court to act in its supervisory capacity with regard to the inferior courts and enforce *sound judicial practices. Cupp v. Naughton,* 414 U.S. 141, 38 L.Ed.2d 368, 94 S.Ct. 396 (1973): "Within the unitary jurisdictional framework the appellate court will, of course, require the trial court to conform to constitutional mandates, but it may likewise require it to follow procedures deemed desirable from the viewpoint of sound judicial practice although nowise commanded by statute or by the Constitution." See also *McNabb v. United States,* 318 U.S. 332, 340, 63 S.Ct. 608, 613, 87 L.Ed. 819 (1943). This Court is compelled by its own precedent to issue the Writ of Certiorari.

ARGUMENT I

THIS PETITION FOR CERTIORARI IS GROUNDED IN THE PUBLIC INTERESTS THAT ARE PROTECTED BY RULE 11 OF THE F.R.CRIM.P. AND THE FEDERAL COURT REPORTER ACT, 28 U.S.C. § 753, AND THE RULE OF THIS COURT AS SET OUT IN THE *MCCARTHY* RULE, *MCCARTHY V. UNITED STATES,* 394 U.S. 459, 22 L.ED.2D 418, 89 S.CT. 1166

(1969). THE PUBLIC INTERESTS ARE FOR THE PROTECTION OF THE ENTIRE POPULATION AND SET WITH A NUMBER OF CONCERNS. THIS COURT IS BOUND TO HEAR THIS PETITION BY ITS OWN PRECEDENT AND IS EMPOWERED, IF NOT BY CONSTITUTIONAL MEANS, THEN BY ITS SUPERVISORY POWERS OVER THE LOWER FEDERAL COURTS.

1. The memorandum decision attached as Appendix B creates new and different law in that the U.S. Eleventh Circuit Court of Appeals finds that the absence of a transcript "does not warrant our vacating the conviction or ordering further inquiry into the matter." *Id.* at 6.

2. The reading of this decision in connection with the Order of the United States District Court for the Southern District of Alabama, Southern Division, the Honorable Richard W. Vollmer, is interpreted to mean that, regardless of why there is no transcript of the plea colloquy and no stipulation other than Oberle's, no "further inquiry into the matter" need be made. This order is included as Appendix A.

3. Now add to this that Oberle has submitted his own affidavit to the court of appeals concerning the lack of any record and that there is no evidence of a record having been made. This affidavit is included in Appendix E along with Oberle's affidavit to the district court as to what occurred during the plea colloquy, given in compliance with the district court's order. This affidavit remains completely uncontroverted. The district court and the appellate court have made their decisions not only in the absence of any record but in disregard of the only evidence proffered.

4. The simplistic ruling by the panel and the district court flies in the face of the *McCarthy* Rule. It also flies in

the face of *Sheuer v. Rhodes,* 416 U.S. 232, 40 L.Ed.2d 90, 94 S.Ct. 1683 (1974) and *Conley v. Gibson,* 355 U.S. 41, 45–46, 2 L.Ed.2d 80, 78 S.Ct. 99 (1957); which was best set out in the case of *United States v. Bird,* 621 F.2d 989, 991 (9th Cir. 1980):

> [1] The government argues that appellant knowingly waived his right to trial counsel at the time of his arraignment. We need not decide whether an adequate record of waiver of trial counsel *might conceivably be established* in an arraignment proceeding since the record in this case is clearly inadequate to establish an effective waiver. There is no transcript of the arraignment. The affidavits filed in an attempt to reconstruct the proceedings suggest only that *the magistrate satisfied himself that the waiver was voluntary,* but shed no light on how he reached that conclusion. *There is, in short, no record which an appellate court can intelligently review.*

Id. at 991 (emphasis added).The district court is forbidden to make a judgment based solely on credibility instead of an inquiry as to the facts. The appellate court is forbidden to attempt to shore up the district court's decision with a modified version of the facts and an alternative scenario that would moot the question. The scenario that the appellate court proffered was an erroneous finding of fact and in no way contained in the facts adduced below. In the order of the district court, Judge Vollmer clearly sets out:

> To accept defendant's statements would be to conclude that the trial judge wholly abandoned his duties by dispensing with the entire guilty plea colloquy then required and now required of trial judges.

The court is unwilling to accept such a conclusion. (Emphasis added.)

The district court satisfied itself that no federal judge could make a mistake. It was his own subjective response to the scenario proffered by Oberle. No further investigation was undertaken, and the United States submitted no controverting evidence.

5. It is the contention of the United States in its original argument to the district court that the cause could be decided sans the record. It was the argument of the United States that the question of the record was not properly before the court of appeals in its reply brief to the appellate court.

6. It is Oberle's contention to the district court that his was the only evidence given, and that it would be necessary to have an evidentiary hearing on the subject if further evidence was to be adduced. It was Oberle's objection to the district court that proceedings had been insufficient to serve as a basis for a final decision. It was Oberle's contention to the appellate court that he had been denied due process of law by the abbreviated decision of the court, and that the appellate court was governed by the Federal Court Reporter Act and was bound to vacate the guilty plea and remand with instructions to the district court since it had been found that there never was a court reporter at the hearing.

7. It was a well-defined line that this Court and the Congress have drawn in the sand concerning the failure to comply with the Act. The Act dovetails with the rulings in *Sheuer v. Rhodes* and *Conley v. Gibson* guarding against the premature dismissal of an action. It is Black Letter Law that a record and a definitive finding of fact is the legacy the district should leave for the appellate court to review. Its job is not complete until it has fulfilled this legacy.

8. The appellate court refers to *Herron v. United States,* 512 F.2d 439 (4th Cir. 1975), but grossly misinterprets *Herron.* Oberle goes to *Herron* at 441:

> [2] In any event, whether the proceedings were not reported, or, if reported, whether the notes were not filed in accordance with 28 U.S.C. § 753(b), or, if filed and lost by the magistrate or the clerk, we think that *McCarthy v. United States,* 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969), requires that defendant's § 2255 motion be granted, that his guilty plea be stricken, and that he be permitted to plead anew.
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> * * * * * *
>
> [3, 4] Even if the district judge's compliance with Rule 11, as he certified, was full compliance with the rule, we think that *McCarthy* and its rationale apply no less to the provisions of 28 U.S.C. § 753(b) that the showing that there was a basis in fact for the plea be reported, that the record be filed and that the record be preserved for the requisite period.

Id. at 441.

9. The U.S. Eleventh Circuit Court of Appeals is creating an exception to the *McCarthy* Rule and ~~to~~ 28 U.S.C. § 753 and to existing precedents such as *Herron.* The appellate court has done the impermissible and sanctioned the unsound judicial conduct of the district court with a general, catch-all exception to the rule. There is no exception to the rule that says if there is no record, no further inquiry need be made as long as the district judge believes that events could not have taken place as the defendant claims.

ARGUMENT II

IT IS DEFINITELY IN CONFLICT WITH THE ESTABLISHED PRECEDENTS OF THE SUPREME COURT AND THE FEDERAL RULES OF CIVIL PROCEDURE TO PREMATURELY DISMISS THE ACTION PRIOR TO THE COMPLETION OF THE RECORD, OR RESOLUTION AS TO THE EXISTENCE OF THE RECORD, OR TO ENGAGE IN ANY ATTEMPT TO RECREATE THE RECORD.

10. Under the teachings of *Sheuer v. Rhodes,* 416 U.S. 232, 40 L.Ed.2d 90, 94 S.Ct. 1683 (1974), and *Conley v. Gibson,* 355 U.S. 41, 45–46, 2 L.Ed.2d 80, 78 S.Ct. 99 (1957), the lower courts are forbidden to dismiss an action *sua sponte* unless they are certain that no basis exists on which the plaintiff could succeed in his action.

11. In no way should the appellate court try to excuse the premature dismissal of an action by *construing the pleadings to create a scenario that would imply doubt* as to whether or not the lower court *could have found something that it did not find.*

12. The appellate court found as follows:

> Evaluating this claim, the district court found that Oberle had failed to allege any conditions that would qualify s legal duress. District Court Order (Record Tab at 4). The court then declared "incredible" Oberle's contention that he had informed the trial court that his plea was made under duress. *Refusing to believe that the trial court would have accepted the plea under such circumstances, the district court held that there was no credible*

evidence to support the claim of involuntariness. Id. at 4–5.

> This ruling regarding Oberle's proposed objection at the plea proceeding is a finding of fact that we review for clear error. We find ***significant Oberle's concession*** that his alleged response during the plea colloquy may have been inaudible to the trial court. As a result of this ***admission***, petitioner no longer alleges unequivocally facts that would support a finding that the trial court violated its Fed. R. Crim. P. 11 duty by ignoring evidence that the plea was involuntary. In light of Oberle's ***admission***, we must sustain as not clearly erroneous the district court's finding that there is no credible evidence of such a Rule 11 violation.

Id. at 4–5 (emphasis added.)

13. Oberle corrected the appellate court's misconstruction of his pleading in his Petition for Rehearing. In the pleadings in the district court, Oberle offered a hypothetical scenario to use as an illustration of a parallel point, that point being that his counsel and the A.U.S.A. in attendance at the hearing are officers of the court and bound to fully participate in the plea colloquy, and if the court overlooks, for whatever reason, its duty or some significant aspect of the proceeding, these officers are bound to bring it to the court's attention and to call for the court to give a definitive disposition of the defect.

14. Oberle offered the following account of this in his Petition for Rehearing:

> This Court has held that I compromised my evidence by my "concession that his alleged response during the plea colloquy may have been

inaudible to the trial court. As a result of this admission, petitioner no longer alleges unequivocally facts that would support a finding that the trial court violated its Fed. R. Crim. P. 11 duty by ignoring evidence that the plea was involuntary." Well, I did not make such an "admission" to anyone. That came about initially in my "Response to the Government's Response" under 1), which says:

> It is the petitioner's contention that when he was making his plea under duress the Court should have had him explain his contention, or, failing that, someone present should have probed his remark. Both his counsel and the A.U.S.A. were aware of his reluctance to plead guilty, and both are officers of the court. Both were aware that the defendant was a less than willing party to the plea bargain.
>
> One other thought here is that the Honorable Judge Cox may nothave heard the remark. Perhaps that would heighten the responsibility of the others in attendance.
>
> Also it is not the petitioner's assertion that "He made the plea 'under duress'" after the fact; petitioner stated positively that he was making the plea "under duress" at the sentencing hearing when questioned by Judge Cox.

Id. I was merely trying to give a scenario by which my proffer is true and there there is a need for a hearing to determine exactly what happened and to highlight that the A.U.S.A. and my counsel, Mr. Armstrong, should bear some responsibility for the

> proeeedings. I in no way said that my communication was "inaudible" to the Court.

Id. at 8–9.

15. Here the circuit court is offering that since Oberle offered the only evidence, any flaw in that evidence fatally flawed the argument. The appellate court has tried to spin an exception out of gossamer thread. What the appellate court has said is: "Refusing to believe that the trial court would have accepted the plea under such circumstances," no further inquiry is necessary. Here the appellate court confers on the district court an authority of infallibility equal to that which the Roman Catholic Church confers upon the Pontiff in matters of the dogma of the church. No mere mortal man is possessed of such infallibility in his day-to-day responsibilities. Even the Catholic Church places a qualifier on Papal Infallibility: that it pertains only to dogma of the church, and that the Pope is guided by God's hand in those matters only. His mortality and fallibility in his day-to-day responsibilities are accepted.

Under the Constitution and the laws of this great nation, we are reminded that no man, especially a federal judge, is infallible in the administration of his day-to-day responsibilities. Nay, there would be no need for this Court of Review if every federal judge were empowered by Congress with the gift of infallibility. That is why this Court and the Congress have mandated that a record and inquiry be made for every action that proceeds in the federal courts. –

ARGUMENT III

THE LOWER COURT MADE ITS DECISION BASED ON BELIEF THAT IT COULD PROPERLY ASSUME THAT THE PETITIONER WAS ENTERING THAT PLEA WITH A COMPLETE UNDERSTANDING OF THE CHARGE AGAINST HIM, AND THAT THE PLEA COLLOQUY REQUIRED BY RULE 11, F.R.CRIM.P., WAS HONORED BY THE DISTRICT COURT. THE DISTRICT COURT BASED ITS DECISION ON THE ASSUMPTION THAT, SINCE COLLOQUY IS REQUIRED, IT THEREFORE OCCURRED. THE LOWER COURTS ARE FORBIDDEN TO MAKE UNFOUNDED ASSUMPTIONS BASED ON THEIR OWN INTUITIONS OR PERSONAL PREJUDICES.

16. The original plea hearing was conducted by the Honorable Judge Emmett R. Cox while he was sitting in the U.S. District Court for the Southern District of Alabama, Southern Division. Judge Cox now sits on the U.S. Circuit Court of Appeals for the Eleventh Circuit.

17. The § 2255 motion was heard by the Honorable Judge Richard W. Vollmer. Judge Vollmer has no first-hand knowledge of the plea hearing, nor does he have any independent recollection of any of the proceedings in that court that day.

18. The only evidence proffered into the record during the § 2255 proceedings was that which Oberle submitted. The United States failed to undertake any action towards stipulating to the record or proffering any affidavits or making any requests of the court to conduct any discovery once they had been unable to unearth any trace of the record.

19. The United States' posture was that there was no record, and there need not be any. The United States

sandbagged Oberle by resting on the absence of any record, hoping that the failure to comply with the Act and Rule 11 would not be discovered by the court or Oberle. This was a tactic on which the government based the defense of its case. This tactic was destined to fail in that it was unsound. The government should not be allowed to reverse its position on the direct appeal and say that the absence of the record was not an issue in the court below or to demand a remand for the stipulation to the record. That option has been lost to the government.

20. The district court then made its decision based solely on its unfounded presumption that "to accept defendant's statements would be to conclude that the trial judge wholly abandoned his duties by dispensing with the entire guilty plea colloquy then required and now required of trial judges. The court is unwilling to accept such a conclusion." *Id.* at 4–5, n. 1 (Appendix A).

21. The district court is forbidden to make its decision based on its prejudice regarding the scenario proffered by the petitioner. The court must rest its decision on sound legal logic or on a sound and detailed examination of the facts. The definition of ignorance and apathy is said to be: "I don't know and I don't care." In this case, the district court did not know what happened at the plea hearing and did not care to find out.

ARGUMENT IV

THE CONCERNS AND INTERESTS OF THE AMERICAN PUBLIC ARE EMBODIED IN THE CASES OF *SHEUER V. RHODES*, 416 U.S. 232, 40 L.ED.2D 90, 94

S.CT. 1683 (1974), AND *CONLEY V. GIBSON,* 355 U.S. 41, 45–46, 2 L.ED.2D 80, 78 S.CT. 99 (1957), AND *MCCARTHY V. UNITED STATES,* 394 U.S. 459, 89 S.CT. 1166, 22 L.ED.2D 418 (1969); THAT A FULL AND COMPLETE RECORD BE MADE OF EVERY ACTION THAT CONCERNS THE PERSONAL LIBERTY OF A CITIZEN SO THAT, THE MORE METICULOUSLY THE RULES ARE ADHERED TO, THE MORE THEY TEND TO DISCOURAGE, OR AT LEAST PERMIT THE EXPEDITIOUS DISPOSITION OF, THE NUMEROUS AND OFTEN FRIVOLOUS POST-CONVICTION ATTACKS ON THE CONSTITUTIONAL VALIDITY OF GUILTY PLEAS AND THE TIME-CONSUMING AND DEBILITATING EFFECT THAT THE APPELLATE REVIEW OF AN ILL-DECIDED OR INCOMPLETELY DEVELOPED COURT RECORD HAS ON THE APPELLATE COURTS' VERY WEARYING SCHEDULES AND THE EXTREME COSTS THAT THE PUBLIC IS CAUSED TO BEAR FROM THE CONSTANT HEARING, REMAND, AND APPEAL TO FINALLY GET A RECORD THAT THE "APPELLATE COURT CAN INTELLIGENTLY REVIEW," *UNITED STATES V. BIRD,* 621 F.2D 989 (9TH CIR. 1980). IT IS THIS COURT'S RESPONSIBILITY TO ENFORCE ITS SUPERVISORY POWERS OVER THE LOWER COURTS EVEN AT TIMES WHEN IT IS IN NO OTHER WAY COMMANDED TO, *CUPP V. NAUGHTON,* 414 U.S. 141, 38 L.ED.2D 368, 94 S.CT. 396 (1973).

22. There are times when the courts are faced with needs not specifically addressed by the Congress or by the Constitution. These needs are most specifically in the interest of the sound judicial administration of the courts and the public

interest in it. One most notable commentation, later to be a member of this panel, said that the federal court system "needs to be shaken by the scruff of the neck." This was in reference to the need for legislation pertaining to the Sixth Amendment right to a "speedy trial." Congress later complied by giving us that Act.

23. There is a very noteworthy difference between the mandated directions from this Court to the inferior courts based on its supervisory powers over those courts and an Act of Congress motivated by the same concerns. That is, this panel speaks from its position of judicial scholarship and the power vested in it by the Congress and the Constitution to supervise the inferior courts and to preserve uniformity among the courts, whereas Congress acts on the basis of its undeniable position as the voice of the people who elected it. An Act of Congress is the express wish of the public and usually made in the best interest of the American people. This Court is loath to usurp an Act of Congress unless it is, on the rarest of occasions, a gross and manifest injustice.

24. Here there is such an Act of Congress, the Court Reporter Act, 28 U.S.C. § 753. This Act brings us Rule 11 of the F.R.Crim.P., which requires the making and preservation of a record and stipulates the methods by which this is to be done. This Court, as much as any other persons or commentators, had an input into this Act, which, like the Speedy Trial Act, was enacted in the public interest as much as in the individual interest to prevent situations such as the present one from occurring. To allow the circuit court and the district court to create an exception to the Law and Statutes of the United States on grounds other than the most compelling and rare dealing with an extreme denial of the Constitutional rights of the people is to go against the very core of our

government, that is, the separation of powers. It would allow the district courts and the circuit courts to make and amend laws at will.

25. Certiorari should be granted because the law of the land commands compliance, with no allowance for circumstances or intuition, and the precedent of this Court validates that legislation and gives us a "Bright Line" rule with no exceptions. It is in the public interest.

CONCLUSION

The Petition For Writ Of Certiorari should be granted because the United States Court of Appeal for the Eleventh Circuit has created an unlawful exception to the Court Reporter Act, 28 U.S.C. § 753. It has created an exception to the teachings of *Sheuer v. Rhodes* and *Conley v. Gibson* by determining that so long as a federal judge believes that he and his colleagues are infallible, they are indeed so, and no discovery need be had nor record made because they are unable to misstep in the performance of their day-to-day duties. It has created an exception to the *McCarthy* Rule, as set out in *McCarthy v. United States,* that if there is any reason to disbelieve the petitioner's scenario, the law need not be applied, which is the reverse of this Court's holding in *McCarthy.* The panel of the U.S. Eleventh Circuit violates its own precedent and that of the former Fifth Circuit, its predecessor, and every other circuit. This Court has recently held that "our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive." *Negonsott v. Samuels,* --- U.S. ---, --- - ---, 113 S.Ct. 1119, 1112–23, 122 L.Ed.2d 457 (1993) (internal quotation

omitted). This creates such a significant issue that certiorari to the Eleventh Circuit must be granted.

Dated: October 13, 1993.

Respectfully submitted,

/s/ *Jefferson Kenneth Oberle*
Jefferson Kenneth Oberle
pro se
12540 Highway 98
Fairhope, AL 36532-9719

Prepared by:

/s/ *Michael Henry Smith*
Michael Henry Smith, 04325-003
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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

V.

CRIM. ACTION NO.
86-0081-RV

JEFFERSON KENNETH OBERLE,

Defendant.

ORDER

Presently pending before the court are defendant's motion for relief, made pursuant to 28 U.S.C. § 2255 (tab 35), and motion for appointment of counsel (tab 34). By order dated February 27, 1992, defendant was ordered to file "any and all evidence that he has to substantiate his claim that his guilty plea was made under duress." Defendant duly complied with the court's order by filing his own affidavit with the court on March 10, 1992. After due and proper consideration of the foregoing, the court hereby **ORDERS, ADJUDGES, and DECREES** as follows:

A. Background

The procedural history of this case is rather simple. On June 25, 1986, defendant was charged in a three count indictment with violating the provisions of 18 U.S.C. §§ 842(j), 844(b), and 1202(a), and 27 C.F.R. §§ 55.164 and 55.201–.220 (tab 1). Defendant was arraigned on said indictment on July 15, 1986 (tab 5). At that time, defendant's case

was set for trial during the court's September 1986, criminal term.

Following a period of pretrial discovery, marked by the filing of numerous discovery-related motions by the defendant (*see* tabs 6, 7, 8, 9; *see also* tabs 10 and 11), defendant moved for (tabs 14 and 15) and was granted (tab 16), a two-month continuance of trial to enable defendant's counsel, Gary Armstrong ("Armstrong"), "additional time to adequately prepare for trial."

Thereafter, on September 26, 1986, defendant pled guilty to, and was sentenced on, count two of the indictment. The court's file reflects that Armstrong was present at the plea hearing. Defendant did not appeal his plea or the probationary sentence imposed.

Nearly five years later, on September 13, 1991, defendant filed a "motion to set aside judgment" ("§2255 motion") (tab 21), alleging therein that his guilty plea had been made under duress and that Armstrong had provided him with ineffective assistance.[1] The defendant also stated that he recently had "come into the information that would afford him an acquittal," although he did not indicate the nature or the substance of that information. Defendant's motion concludes with a statement that defendant, in essence, wishes to clear his name

---

[1]Actually, defendant states the following with respect to Armstrong:

> The defendant wishes to ask the court to set aside his plea and it's judgement [sic] on the grounds that he had ineffective counsel. The defendant does not wish to say that his attorney, Gary L. Armstrong was incompetent, rather that Mr. Armstrong was not cognizant of all the relative [sic] facts. Because of this, the defendant was instructed to make an improper plea....
>
> Also, Mr. Armstrong's misinterpretation of the defendant's liability was the key to the plea.

and be relieved "from the undeserved stigma and burden of being a felon."

Upon receiving defendant's § 2255 motion, the court ordered the government to file a response. The government did so on December 30, 1991 (tab 30). In its response, the government noted that a transcript of defendant's guilty plea hearing no longer is available and argued in some detail why defendant's § 2255 motion should be summarily denied.

Believing defendant's original motion to be too vague to be processed, the court thereafter directed the defendant to file a more detailed statement of his claim for relief (tab 31). The defendant complied with the court's request first by filing a supplemental description of his claim (tab 32) and later by filing a statement of his claim on a court-provided form (tab 35).[2] In each the defendant reasserts his contentions that he pled guilty under duress[3] and that his attorney provided ineffective assistance.[4]

---

[2]In his third statement of the case, enumerated on a court-provided form, defendant attempts to state three claims for relief. Claims one and three, each of which alleges that defendant pled guilty under duress, are virtually identical and shall be treated as such. The second claim for relief is premised on counsel's alleged ineffective assistance.

[3]The crux of his "duress" claim is that the court failed to inquire into the voluntariness of defendant's plea after defendant indicated that he was entering a guilty plea under duress.

[4]Defendant changed his ineffective assistance of counsel claim somewhat by charging that his attorney, *inter alia*, "did not properly explain [defendant's] liabilities, nor did he act in a zealous manner." He further notes that his "attorney's unwillingness to research and prepare for trial, coupled with his insistence on a plea bargain left [defendant] confined to a no choice situation. [He] either had to plead guilty or face trial with no defense." *See* tab 35.

As noted, *supra,* the defendant subsequently, pursuant to the court's request, submitted an affidavit in support of his claims. In his affidavit, defendant summarily states that he "was asked by Judge Cox [during his September 26, 1986, guilty plea hearing] if this plea was being made under duress and [he] answered in the affirmative. No investigating or questioning about [his] answer was done by anyone present." He further states that his

> attorney of record, Mr. Gary Armstrong of Daphne, Alabama was not zealous or competant [sic] (as [he] now understand[s] the word) in his handling of [defendant's] case. [Armstrong] refused to explore any avenues of defense which placed [defendant] in a do or die position at [his] plea hearing. [Armstrong] was unwilling to defend [him].

In a separate "brief" submitted with his affidavit, defendant notes that there are various unidentified people who would be able to substantiate his claims if they were compelled to testify at an evidentiary hearing.

B. Discussion

1. *Duress.*—The court finds defendant's duress claim to be incredible. Not only has defendant failed to allege *any* facts in support of his contention that he was acting under legal duress at the time he pled guilty, but he also disingenuously maintains that the trial judge did not conduct *any* sort of inquiry after defendant informed the judge that he was so pleading. To accept defendant's statements would be to conclude that the trial judge wholly abandoned his duties by dispensing with the entire guilty plea colloquy then required and

now required of trial judges.[5] The court is unwilling to accept such a conclusion.

2. ***Ineffective Assistance of Counsel.***—The United States Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 674 (1984), establishes a two-pronged test for evaluating ineffective assistance of counsel claims. To prevail on such a claim, a defendant essentially must allege and prove that his counsel's performance fell below an objective standard of reasonableness and that, but for his counsel's deficient conduct, the outcome of defendant's case would have been different. In this case, defendant has failed to allege sufficient facts on each of those prongs to be entitled to ultimate relief, much less to an evidentiary hearing.

Specifically, defendant only summarily contends that Armstrong failed to investigate defendant's case and failed properly to explain defendant's "liabilities." Defendant does not state what Armstrong could have done differently or what information Armstrong could and should have discovered which would have completely exonerated the defendant of the charges against him.[6]

---

[5]One of the fundamental purposes underlying the extended colloquy between a trial judge and a defendant during a guilty plea hearing is to ensure that a plea is being rendered knowingly and voluntarily by a competent person. Undoubtedly, most if not all guilty pleas are made under some duress, but "some" sense of duress is not sufficient to render a plea involuntary.

[6]The court's file in this case, in fact, reflects that Armstrong diligently pursued discovery up to the point at which defendant pled guilty.

C. Conclusion

In light of the foregoing, the court concludes that defendant's request for relief, made pursuant to 28 U.S.C. § 2255, is due to be, and hereby is, **DENIED.** All other pending motions, moreover, including defendant's request for appointment of counsel, are due to be, and hereby are, declared **MOOT.**

DONE this the 15th day of March, 1992.

/s/ Robt. W. Vollmer, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX B

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 92-6391
Non-Argument Calendar

D. C. Docket Nos. CV-91-0866-RV
CR 86-0081

JEFFERSON KENNETH OBERLE,
a/k/a Jefferson Kenneth Jones,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Alabama

(April 23, 1993)

Before KRAVITCH, ANDERSON, and BIRCH, Circuit Judges.

PER CURIAM:

Petitioner-appellant Jefferson Kenneth Oberle, a federal offender, appeals from the district court's denial of his *pro se* 28 U.S.C. § 2255 petition for habeas corpus relief. We affirm.

I. BACKGROUND

Oberle pleaded guilty on September 26, 1986, to one count of unlawful possession of a firearm in violation of 18 U.S.C. § 1202(a)(1), and was sentenced to five years probation. On September 13, 1991, approximately two weeks prior to the expiration of his probation, Oberle filed a motion "to set aside judgment." Petitioner's First Motion (Record Tab 21). The district court interpreted this pleading as a § 2255 motion to "vacate, set aside or correct [a federal] sentence" (Record Tab 23), and ordered Oberle to file an amended motion setting forth with greater specificity his grounds for relief (Record Tab 31). In his amended motion, Oberle alleged: (1) that his plea had been made under duress and therefore was involuntary in violation of Fed. R. Crim. P. 11 and the Fifth Amendment's due process requirement, and (2) that he had been afforded ineffective assistance by his court-appointed counsel in violation of the Sixth Amendment. Petitioner's Amended Motion (Record Tab 32). The district court denied both claims, District Court Order (Record Tab 38), and Oberle filed this appeal.

II. ISSUES

A. INVOLUNTARY PLEA

In support of his claim that his plea was coerced, Oberle alleges that, during the plea colloquy, when the trial court inquired whether his plea was voluntary, Oberle responded that "of course he was making the plea under duress." Petitioner's

Amended Motion (Record Tab 32). However, Oberle also states that "[the trial judge] may not have heard the remark." *Id.* As to the nature of the alleged duress, Oberle identifies two considerations that he maintains forced him to plead. First, he states that he desired to resolve the charges against him expeditiously in order to avoid disrupting his family life. *See* Petitioner's First Motion (Record Tab 21) ("In an effort to preserve [my] family (Here lies the major duress) [I] made a hasty and ill advised plea at the urging of counsel.") Second, he contends that "[his] attorney's unwillingness to research and prepare for trial, coupled with his insistence on a plea bargain confined [him] to a no choice situation." § 2255 Form Motion (Record Tab 35 at 5).

Evaluating this claim, the district court first found that Oberle had failed to allege any conditions that would qualify as legal duress. District Court Order (Record Tab 38 at 4). The court then declared "incredible" Oberle's contention that he had informed the trial court that his plea was made under duress. Refusing to believe that the trial court would have accepted the plea under such circumstances, the district court held that there was no credible evidence to support the claim of involuntariness. *Id.* at 4–5.

This ruling regarding Oberle's supposed objection at the plea proceeding is a finding of fact that we review for clear error. We find significant Oberle's concession that his alleged response during the plea colloquy may have been inaudible to the trial court. As a result of this admission, petitioner no longer alleges unequivocally facts that would support a finding that the trial court violated its Fed. R. Crim. P. 11 duty by ignoring evidence that the plea was involuntary. In light of Oberle's admission, we must sustain as not

clearly erroneous the district court's finding that there is no credible evidence of such a Rule 11 violation.

We recognize that conclusive rebuttal of Oberle's allegations as to his response during the plea colloquy has been complicated by the fact that the U.S. Attorney's office and/or a commercial transcription service have apparently lost the transcript of the plea proceeding. *See* Record Tab 28. Although he did not make an issue of it in his district court motions, on appeal Oberle argues that this loss of the transcript by itself entitles him to have his plea vacated. Appellant's Initial Brief at 6. Where a habeas petitioner makes detailed and serious allegations concerning the voluntariness of a plea and the sentencing court's compliance with Rule 11, but is precluded by the absence of a plea transcript from documenting his or her charges, then it may indeed be necessary to vacate the conviction, *see Herron v. United States,* 512 F.2d 439 (4th Cir. 1975), if a detailed account of the colloquy cannot be constructed through other means. *See* Fed. R. App. P. 10(c) (providing for reconstructing hearing proceedings when transcript is unavailable); cf. Rule 5 of the Rules Governing § 2254 Proceedings ("If a transcript is neither available nor procurable, a narrative summary of the evidence may be submitted.") Here, however, the petitioner has failed adequately to allege circumstances under which the trial judge's acceptance of his plea would violate Rule 11. On such facts, the absence of a plea transcript does not warrant our vacating the conviction or ordering further inquiry into the matter.

The district court's holding that Oberle has not alleged facts supporting a claim that his plea resulted from any legally recognized form of duress is a ruling of law that we review de novo. The first of the forces that Oberle alleges

motivated him to plead—his desire to resolve the matter expeditiously—plainly does not constitute duress of the sort that may render a plea legally involuntary. It is true that the second source of duress that he invokes—his attorney's alleged insistence that he plead and refusal to prepare for trial—could, if proven, render his plea constitutionally involuntary. However, when a defendant who pleads guilty on the advice of counsel seeks to challenge the voluntary and intelligent nature of his plea by attacking the appropriateness of his or her attorney's advice, he or she may do so only by establishing that the advice qualified as unconstitutionally ineffective assistance of counsel. *Tollett v. Henderson,* 411 U.S. 258, 267, 93 S. Ct. 1602, 1608 (1973). Because, as discussed below, Oberle has failed to allege facts sufficient to support a claim of ineffective assistance of counsel, particularly as regards the "prejudice" requirement of *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052 (1984), his allegations of duress based on his attorney's behavior are also inadequate. We therefore affirm the district court's ruling that Oberle has failed adequately to allege that his plea resulted from any legally recognized form of duress.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Oberle's claim of ineffective assistance of counsel is supported only by the following summary allegations:

> My attorney did not properly explain my liabilities, nor did he act in a zealous manner. He did not test the limits of my defense. Instead he pushed me to a plea bargain against all my directions and wishes.

§ 2255 Form Motion (Record Tab 35 at 4).

> Also, he…refused to study relevant cases supplied by the petitioner (or cited anyway) saying that he didn't have sufficient time due to his case load, the impending birth of his child, and the limited financial return of being appointed to me…case.

Petitioner's Amended Motion (Record Tab 32). The district court ruled that Oberle has failed to allege facts sufficient to satisfy either the "performance" or "prejudice" prongs of the test for unconstitutionally ineffective assistance of counsel articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). We affirm this conclusion. When alleging ineffective assistance of counsel with respect to a guilty plea, a defendant must, in order to satisfy the *Strickland* prejudice requirement, show there is a reasonable probability that, but for counsel's errors, he or she would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985). Such a showing is in turn deemed to depend on evidence that such a trial would have been likely to yield a better result for the defendant than the plea agreement did. *Id.* at 59, 106 S. Ct. at 370–71. As Oberle has made no such showing, he has failed to establish the prejudice required for a claim of ineffective assistance of counsel.

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-6391

JEFFERSON KENNETH OBERLE,
a/k/a Jefferson Kenneth Jones,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

On Appeal from the United States District Court for the
Southern District of Alabama

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before KRAVITCH, ANDERSON, and BIRCH, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on

rehearing en banc (rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson
UNITED STATES CIRCUIT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-6391

JEFFERSON KENNETH OBERLE,
a/k/a Jefferson Kenneth Jones,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the
Southern District of Alabama

ORDER:

The motion of Appellant-Jefferson Kenneth Oberle for (x) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

/s/ *R. Lanier Anderson*
UNITED STATES CIRCUIT JUDGE

APPENDIX E

AFFIDAVIT

I, Jefferson Kenneth Oberle, do hereby swear and affirm the following:

That once I was aware of the fact that the transcripts and the notes of my hearing were missing I joined in the search and have personally spent many hours searching for them. I have spoken personally with the staff of the Clerk of the Court for the U.S. District Court for the Southern District of Alabama in Mobile, Alabama. They have not been able to produce any trace of the transcript. I have contacted the Court Reporter who was supposed to have transcribed the hearing and he has no trace of it or any notes or an audio tape. Not one person that I have spoken with has an independent recollection of the transcript or its contents. All of those whom I have spoken with have sworn that they are not hiding or diverting any information. They told me that the U.S. Attorney's Office has been searching also.

In summation I swear that to the best of my knowlege no record of the hearing exists.

Sworn this 1st day of June 1992 by
/s/ *Jefferson K. Oberle*
Jefferson Kenneth Oberle

APPENDIX F

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Miguel J. Cortez
Clerk

July 24, 1992

Jefferson K. Oberle
Route 1, Box 121-A
Fairhope, Alabama 36532

RE: 92-6391 Oberle v. USA

Dear Mr. Oberle:

We are in receipt of your Appeal Information Sheet which requests transcription of the September 26, 1986 guilty plea hearing concerning the matter above. On June 18, 1992 we received a letter from Court Reporter Edward J. Howard which indicates that there are no court reporter notes for the sentencing hearing and thus the transcript cannot be reproduced.

In light of the above, please advise us within 14 days of the date of this letter as to whether you will proceed on appeal without the transcript, or whether you intend to prepare a statement of the evidence in accordance with the procedure specified in Fed.R.App.P. 10(c) (copy attached).

Sincerely,

MIGUEL J. CORTEZ, Clerk

By: */s/ David Maland*
David J. Maland
Chief Deputy Clerk

DJM/sh

Attachment

c: J. B. Sessions, III
Clerk/USDC/Mobile